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November 20, 2007

J. Stephen Opp, P.G.
Montana Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

**MAILED & FAXED TO 406-841-5050**

**RE: Sunburst Restoration**
**Our File No. 06-051**

Dear Mr. Opp:

I am in receipt of your letters to John Davis and David Erickson of Water & Environmental Technologies (WET) dated October 16 and November 7. WET has been retained by this firm's clients to perform environmental cleanup on their private property in Sunburst, Montana. The contemplated cleanup has been the subject of litigation before the Montana Eighth Judicial District Court, as well as the Montana Supreme Court, for almost seven years. On August 6, the Montana Supreme Court issued its decision in *Sunburst School District No. 2 v. Texaco, Inc.*, 2007 MT 183, 338 Mont. 259, 165 P.3d 1079. The Supreme Court affirmed a compensatory damage judgment entered in favor of our clients, including a very substantial recovery of restoration damages. In its decision, the Supreme Court expressly authorized our clients to proceed with the environmental cleanup necessary to restore their properties.

In your letters, you advised WET that the work it intends to do in Sunburst cannot be undertaken without the written permission of the Montana Department of Environmental Quality (DEQ). In support of this assertion, you cite § 75-10-706(3), MCA, a provision of the Comprehensive Environmental Cleanup and Responsibility Act (CECRA). You further advised that if WET were to undertake any investigation or cleanup activities in Sunburst without DEQ's written permission, DEQ would initiate some enforcement action. Although WET provided you with a very simple and straightforward work plan, which contemplated some limited sampling activity, you did not approve the activity and instead drove to Sunburst where you instructed WET personnel to cease all operations.

DEQ's position as set forth in your letters is erroneous for a number of reasons. First, the Montana Eighth Judicial District Court and Montana Supreme Court have both held CECRA does not preempt our clients' rights. Throughout the course of the litigation referenced above, Texaco argued that CECRA preempted our clients' claims against it. The trial court and Supreme Court

both disagreed, finding the Sunburst citizens' common law rights completely independent of CECRA. Both courts approved a damage award for environmental cleanup, finding our clients have the right to cleanup their own property irrespective of parallel enforcement activity by DEQ under CECRA. I have attached a copy of the trial court's post-trial order for your immediate reference. The Montana Supreme Court's decision is available on its website and can be accessed utilizing the citation provided above. The Montana Supreme Court is the ultimate authority with respect to the interpretation of CECRA, and DEQ is bound by its interpretation. Thus, neither § 75-10-706(3) nor any other provision in CECRA can interfere with the restoration our clients plan to pursue based on their common law and constitutional rights.

Furthermore, § 75-10-706(3), by its own terms, applies only to parties who are "not subject to an administrative or judicial order. . ." Our clients are subject to multiple judicial orders, including the order attached hereto and the decision of the Montana Supreme Court referenced above. Therefore, written permission of the DEQ would not be necessary under the statute regardless of the Supreme Court's explicit holding that the statute does not apply.

Despite our disagreement with DEQ's position as set forth above, we remain hopeful that further conflict regarding this matter can be avoided. In pursuing claims against Texaco and now hiring a contractor to perform environmental investigation and cleanup, our clients have always intended to cleanup their properties. The policy behind DEQ's authority to enforce CECRA is entirely consistent with their goal. In fact, the statute cited in your letter specifically states one of the purposes of CECRA is to "encourage private parties to cleanup sites within the state at which releases of hazardous or deleterious substances have occurred. . ." Considering the consistency between the goal of our clients and the very purpose of DEQ, we cannot imagine a scenario where DEQ would seek to prevent private parties from cleaning up their own property, or unnecessarily delay such activities.

As reflected by Mr. Erickson's actions in providing a work plan to you, we are not opposed to advising DEQ of the activity our clients undertake. Likewise, we are willing to hear and consider any comments DEQ may have regarding the work. While we do not believe DEQ has authority to prevent our clients from using the proceeds of a Judgment affirmed by the Montana Supreme Court to cleanup their properties as contemplated by the Court, conflict over the issue should be unnecessary. Our clients' activities are intended to accomplish a cleanup. They are wiling to share information and consider input from DEQ. Given DEQ's responsibility to encourage cleanup, conflict requiring further Court intervention should be avoidable.

In your November 7 letter, you suggested DEQ will require 30 days to review and comment on work plans. When you were present in Sunburst, you told the WET representative on site that your superiors at DEQ, including the legal department, needed to review the plan. While 30 days may be reasonable with respect to certain, complex work plans, the initial plan WET provided to you was very simple and straightforward. The plan contemplated some limited sampling to further define the horizontal and vertical extent of soil contamination in the town of Sunburst. Cleanup activities were not involved, only additional investigation.

The WET plan proposed standard drilling and sampling methods, with routine analytical procedures. The same work plan has been approved by DEQ, not only for investigation work in Sunburst, but also for investigation work in three other locations in Montana. On each of those occasions, the plan was approved in less than 14 days. Similar activities undertaken by Texaco in Sunburst have not required 30 days for approval and have not been subjected to scrutiny by DEQ's department heads and legal advisors. Your November 7 letter suggests a day of notice is unreasonable. We can agree that more than a day of notice should be provided. However, 30 days to review a simple plan of this kind is equally unreasonable.

Please consider the investigation work proposed by WET and approve the work as soon as possible. If DEQ has some substantive objection to the work, please explain its position as soon as possible. In the meantime, if you or any other representative of DEQ would like to discuss any of these issues with us, you should not hesitate to call. We look forward to hearing from you.

Sincerely,

Mark M. Kovacich

MMK:dak
Enclosure
cc: Attorney General Mike McGrath

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

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|---|---|---|
| SUNBURST SCHOOL DISTRICT NO. 2, et. al.,<br><br>Plaintiffs,<br><br>vs.<br><br>TEXACO, INC., a Delaware Corporation for Profit; TEXACO REFINING AND MARKETING, INC., a Delaware Corporation for Profit; and DOES A - Z, Inclusive,<br><br>Defendants. | ) | CAUSE NO. CDV-01-179(a)<br><br><br><br>**ORDER DENYING DEFENDANTS' MOTIONS FOR NEW TRIAL AND FOR JUDGMENT AS A MATTER OF LAW** |

Following a jury verdict in favor of the plaintiffs, the defendants have moved the Court for a new trial and for judgment as a matter of law with respect to several of the plaintiffs' claims. The motions raise multiple issues which have previously been addressed by this Court. Among other matters, defendants claim the Court erred with respect to its pretrial rulings concerning the plaintiffs' constitutional tort claims and defendants' statute of limitations defense. The Court has already addressed those issues in detailed written Orders, and its rulings stand. Additionally, defendants argue the Court erred in directing a verdict on the plaintiffs' claims for strict liability in tort. The Court issued its ruling in open Court, addressing each of the factors from the Restatement (Second) of Torts, § 520, and the ruling stands. Additional specifications of error raised by the defendants are addressed below.

## EVIDENTIARY MATTERS

The defendants claim the Court erred with respect to several of its evidentiary rulings. First, they argue the Court should have allowed them to introduce evidence in concerning their interactions with the Montana Department of Environmental Quality (MDEQ). Prior to trial, the Court granted the plaintiffs' motion in limine and excluded such evidence. On August 2, the Court issued a written Order so holding.

First, the evidence defendants sought to introduce regarding MDEQ was not relevant to the issues at hand, and as such, was necessarily excluded. Rule 402, Mont.R.Evid. The parties agree that MDEQ's activities in Sunburst related to its administration of the Comprehensive Environmental Cleanup and Responsibility Act (CECRA), § 75-10-701, MCA, et seq. The plaintiffs did not assert claims under CECRA, instead choosing to pursue common law causes of action and common law remedies. MDEQ's actions and opinions based on the statutory requirements of CECRA were therefore not at issue. Evidence of such matters would have confused the issues in an already lengthy and complex trial. Rule 403, Mont.R.Evid.

Additionally, the Court finds that by offering evidence concerning the MDEQ in its decisions, the defendants sought to cloak themselves in the authority of the State of Montana. The State of Montana was not a party to this case, and its conduct was not at issue. The Court allowed Texaco to defend its own actions without shifting responsibility to an unnamed party. *Plumb v. Fourth Judicial Dist. Court*, 279 Mont. 363, 927 P.2d 1011, 1019 (1996).

Finally, much of the evidence the defendants offered concerning MDEQ was expert opinion evidence. Prior to trial, the Court issued a Scheduling Order requiring the parties to disclose any expert

opinion evidence they intended to introduce at trial by a specified date. The defendants filed expert witness disclosures. The disclosures, however, did not properly set forth the opinions they attempted to introduce concerning MDEQ.

The defendants argue that the Court improperly excluded expert testimony offered through three of their witnesses, Linda Barnes, Charles DeWolf, and Karen Vetrano. The disclosures for these witnesses did not set forth their opinions or the grounds therefore as required by this Court's Order and the Montana Rules of Civil Procedure. Defendants argue the opinions were disclosed because they were available in various reports submitted to MDEQ. The Court notes that countless such reports filling dozens of three-ring binders were brought into the courtroom during trial. The purpose of the expert witness disclosure requirements is to prevent surprise and allow parties to prepare for cross-examination of experts. The Court reviewed the defendants' witness disclosures in detail and finds that no meaningful information was provided from which the plaintiffs could have prepared for cross-examination. Referencing thousands of pages of documents available in some remote location does not suffice.

The defendants also suggest they were not required to disclose their expert witnesses because the witnesses were not retained for purposes of litigation. First, the Court observed the defendants' witnesses, particularly Ms. Barnes who testified over the course of several days. While the witnesses may have been initially hired apart from this litigation, they were actively involved and no doubt paid to assist the defendants in defending this case. The Court's Scheduling Order required disclosure of all expert testimony, consistent with the requirements of Montana law. *Vestre v. Lambert*, 249 Mont. 455, 817 P.2d 219 (1991).

Finally, defendants argue the Court should have excluded all evidence of environmental contamination at their former refinery site, aside from one pipeline leak which was discovered in 1955. The plaintiffs offered evidence of multiple leaks and spills involving various contaminants throughout the refinery site. Considered together with the testimony of the plaintiffs' expert witnesses and the defendants' corporate representatives, the evidence indicated that the former refinery operations resulted in significant contamination on the former refinery site which has served and continues to serve as a source of contamination to the town. The defendants claim all of the pollution in Sunburst came from one pipeline leak, and that contention was shared with the jury. It was up to the jury to consider the evidence and decide what, if any, weight to afford it.

**LIABILITY**

The defendants also claim the Court erred with respect to several rulings concerning their liability. First, they claim the Court erred by directing a verdict in favor of the plaintiffs on their trespass claims. In fact, defendants claim the Court should grant them judgment as a matter of law on the plaintiffs' trespass claims. The Court directed a verdict in favor of the plaintiffs owning property on the defendants' contaminant plume. The defendants admitted that the contaminant plume existed and that they were responsible for it. The Court finds the defendants were under an ongoing duty to remove the contamination from the plaintiffs' properties. The defendants admitted they have not done so. A party commits intentional trespass when he fails to remove something from the land of another which he is under an obligation to remove. Restatement (Second) of Torts, § 158. Therefore, based on the unrefuted evidence, the defendants are continuously trespassing on the properties of those plaintiffs.

The defendants argue their pollution is harmless and cannot constitute a trespass. The Court heard considerable evidence concerning the nature of the defendants' pollution in Sunburst. The defendants' representatives admitted the pollution contains carcinogens. The Court and the jury saw photographs of black stained soil. In Montana, property rights and the right to a clean and healthful environment are constitutionally protected. The defendants' suggestion that they can allow pollutants to remain on another's property simply because the pollutants are buried is untenable.

The defendants also argue they are entitled to judgment as a matter of law on the plaintiffs' public nuisance claims. The Court instructed the jury on the requirements of proof for a public nuisance claim, and the jury found the defendants liable. The verdict was supported by the evidence, and this Court will not disturb it. Likewise, the defendants argue they are entitled to judgment as a matter of law on the plaintiffs' constructive fraud claims. Again, the jury was instructed as to the requirements of proof for a constructive fraud claim. The jury considered the evidence and found the defendants liable. Again, the jury's finding was supported by the evidence.

Finally, the defendants claim they are entitled to judgment as a matter of law on the plaintiffs' claims for wrongful occupation of property. At the close of the evidence, the Court granted the defendants' motion for judgment as a matter of law on the wrongful occupation claims asserted by the plaintiffs owning property off the plume. As to the plaintiffs owning property on the plume, Montana law recognizes a cause of action for wrongful occupation of property. *Goodover v. Lindey's, Inc.*, 255 Mont. 430, 843 P.2d 765 (1993). The defendants claim the cause of action is duplicative of the plaintiffs' trespass claims. However, the statutory remedy for wrongful occupation of property is

distinct from the remedies available for trespass. The plaintiffs are therefore entitled to pursue both causes of action.

**DAMAGES**

The defendants claim the Court erred by allowing the plaintiffs to recover restoration damages for the injury to their property. Under Montana law, the proper measure of damages for permanent injury to real property is the diminution in property value caused by the injury. The proper measure of damages for temporary injury to real property is the cost needed to restore the property to its preinjury status. *Burk Ranches, Inc. v. Rieber*, 242 Mont. 300, 790 P.2d 443 (1990). All of the evidence introduced at trial, including testimony from the defendants' own corporate representatives, confirmed that the injury to the plaintiffs' property was temporary. In some cases, the question of whether property damage is permanent or temporary may present an issue of fact. Here, however, the defendants offered no evidence to suggest that the injury was permanent. As such, the Court found as a matter of law that restoration was the proper measure of recovery.

The defendants also claim the damage to the plaintiffs' property should have been presumed permanent, because the cost of restoration exceeds the value of the property. In *Burk Ranches*, the Montana Supreme Court held an injury to property is "presumptively permanent when the cost of repair greatly exceeds the property's decreased value." The court also stated, however, that the presumption of permanence is rebuttable, and that restoration damages exceeding the property's decreased value can be recovered when the circumstances of the case compel repair or replacement of the property. *Burk Ranches*, 790 P.2d at 447, N.3. The Court finds the circumstances of this case compel repair of the property. The defendants admit their former operations resulted in pollution of

properties owned by the plaintiffs. Limiting those plaintiffs to recovery of diminished property value would do nothing to correct the environmental insult at issue. Under Article II, § 3 of the Montana Constitution, all persons have a fundamental inalienable right to a clean and healthful environment. *Montana Environmental Information Centers v. Department of Environmental Quality*, 296 Mont. 207, 988 P.2d 1236 (1999). Restricting the plaintiffs to diminished property value under these circumstances would render that right meaningless. Montana's strong public policy of environmental preservation is furthered by allowing recovery of restoration damages which will be used to remove pollution from the environment.

The defendants argue the plaintiffs' constitutional right to a clean and healthful environment can only be enforced through CECRA. Nothing in the language of CECRA, however, limits the plaintiffs' common law rights, and nothing in that statute can limit the plaintiffs' constitutional rights. The Montana Supreme Court has interpreted the Montana Constitution as providing "farsighted" environmental protection. *MEIC*, 988 P.2d at 1249. Under CECRA, the authority of MDEQ to compel environmental remediation is confined by statutes and regulations which include health based limitations on cleanup and consideration of cost. In *MEIC*, the court held it was error to restrict the constitutional right to a clean and healthful environment to situations where "public health is threatened" or "current water quality standards are effected to such an extent that a significant impact has been had..." *MEIC*, 988 P.2d at 1249. CECRA can be used to protect the environment to a degree, but the constitutional right to a clean and healthful environment goes beyond the protections afforded by CECRA.

The defendants also attack the jury's award of environmental investigation costs as reimbursement for litigation expenses. However, the defendants offered no evidence to prove that the

plaintiffs' environmental investigation costs were merely litigation expenses. To the contrary, the plaintiffs' experts testified that the investigation was a necessary response to the defendants' pollution. As such, the investigation costs constitute a loss occasioned by the defendants' conduct. The purpose of tort remedies is to restore the plaintiffs to their rightful position. Allowing the plaintiffs in this case to recover costs incurred as a result of the defendants' wrongdoing appropriately recognizes that objective.

The defendants also complain that the jury's awards for restoration and environmental investigation were not individualized. The plaintiffs have represented to this Court that the restoration award will be utilized for restoration. Based on the evidence, the cleanup in Sunburst will be a singular effort. Likewise, the environmental investigation was a joint effort. Dividing these awards among the plaintiffs individually would have served no useful purpose.

In conclusion, the verdict rendered in this case reflects the reasoned judgment of twelve Cascade County residents fulfilling their public duty as jurors. The defendants are neither entitled to another trial nor to judgment as a matter of law.

WHEREFORE, IT IS HEREBY ORDERED that the defendants' motions for a new trial and for judgment as a matter of law are DENIED.

DATED this 19 day of October, 2004.

THOMAS M. McKITTRICK

THOMAS M. McKITTRICK, DISTRICT COURT JUDGE

cc: Lewis, Slovak & Kovacich, P.C.
Gough, Shanahan, Johnson & Waterman
Steptoe & Johnson, LLP